No. 80-2093

Office-Supreme Court, U.S.
FILED
JUL 6 1981
ALEXANDER L. STEVAS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SEA-LAND SERVICE, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF RESPONDENT IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Questions Presented for Review

1. Did the petition of the Department of Justice to set aside an order of the Federal Maritime Commission present an adversary case or controversy?

2. May the Department of Justice invoke the administrative orders review provisions of the Hobbs Act, 28 U.S.C. § 2341 et seq.?

Reference to Parties Below

The following were parties to the proceedings below:

United States Department of Justice on behalf of the United States of America, Petitioner below.
Federal Maritime Commission, Respondent below.
Sea-Land Service, Inc., Intervenor below. (Parents: Sea-Land Industries, Inc. which in turn is wholly owned by R. J. Reynolds Industries, Inc.; Affiliates: Sea-Land Industries (U.S.A.) Inc. and Sea-Land Industries, Ltd.)
Gulf-United Kingdom Rate Agreement,
Pacific Westbound Conference,
Far East Conference,
Seatrain International, S.A.,
Pacific Coast European Conference,
North Europe-U.S.-Pacific Freight Conference,
Trans-Pacific Freight Conference of Japan/Korea,
Japan/Korea-Atlantic and Gulf Freight Conference,
Trans-Pacific Freight Conference (Hong Kong),
New York Freight Bureau,
Agreements No. 10107 and 10108,
Atlantic and Gulf/Panama Canal Zone, Colon and Panama City Conference,

Central American and Mexico Conference,
Atlantic and Gulf/West Coast of South America Conference,
East Coast Columbia Conference,
Leeward and Windward Islands and Guianas Conference,
United States Atlantic and Gulf-Haiti Conference,
United States Atlantic and Gulf-Jamaica Conference,
United States Atlantic and Gulf-Santo Domingo Conference,
United States Atlantic and Gulf Venezuela and Netherlands Antilles Conference, and
West Coast South America Northbound Conference.
—Intervenors below.

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Opinions Below

The Opinion of the Court of Appeals dated December 19, 1980, in *United States of America* v. *Federal Maritime Commission*, (D.C.Cir. No. 79-1299) is found at Appendix ("App.") A to the Petition For A Writ of Certiorari ("Petition"). The Court's holding was followed in a second opinion of another panel of the same court dated December 29, 1980, in D.C. Cir. No. 79-1325. This later opinion is set forth at App. E to the Petition. The March 13, 1981, Orders of the Court of Appeals denying the Petition for Rehearing and Suggestion for Rehearing En Banc are reproduced at App. C to the Petition.

Finally, the Order of Approval of Agreement No. 10140-8 of the Federal Maritime Commission of August 30, 1978, is reproduced at App. B to the Petition.

Jurisdiction of This Court

Because the Suggestion for Rehearing En Banc of the United States was granted, the Court of Appeals has not entered a judgment in this case. (App. C to the Petition) This Court has jurisdiction by virtue of 28 U.S.C. § 1254(1) which authorizes review of the judgments of the courts of appeal by writ of certiorari.

Statutes and Regulations Involved

Section 15 of the Shipping Act, 1916, as amended, 46 U.S.C. § 814, is reproduced at App. D, p. 94a, to the Petition.

Article III, Section 2 of the Constitution of the United States is reproduced at App. D, p. 97a to the Petition.

The Hobbs Act, at 28 U.S.C. § 2344, provides that:

> On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. The action shall be against the United States. The petition shall contain a concise statement of—
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> (1) the nature of the proceedings as to which review is sought;
>
> (2) the facts on which venue is based;
>
> (3) the grounds on which relief is sought; and
>
> (4) the relief prayed.

The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The

clerk shall serve a true copy of the petition on the agency and on the Attorney General by registered mail, with request for a return receipt.

The Hobbs Act, at 28 U.S.C. § 2348 provides that:

> The Attorney General is responsible for and has control of the interests of the Government in all court proceedings under this chapter. The agency, and any party in interest in the proceeding before the agency whose interests will be affected if an order of the agency is or is not enjoined, set aside, or suspended, may appear as parties thereto of their own motion and as of right, and represented by counsel in any proceeding to review the order. Communities, associations, corporations, firms and individuals, whose interest are affected by the order of the agency, may intervene in any proceeding to review the order. The Attorney General may not dispose of or discontinue the proceeding to review over the objection of any party or intervenor, but any intervenor may prosecute, defend or continue the proceeding unaffected by the action or inaction of the Attorney General.

Statement of the Case

Under section 15 of the Shipping Act, 1916, 46 U.S.C. § 814, common carriers by water which seek to enter into and implement certain types of agreements which, inter alia, fix or regulate transportation rates or competition, must first seek the approval of the Federal Maritime Commission ("Commission"). If approved, these agreements are exempt from the prohibitions of the antitrust laws. In accordance with section 15, the members of the Gulf/United Kingdom Conference, Seatrain International, S.A., and United States Lines, Inc., sought Commission approval of

a 48-hour rate agreement—assigned Agreement No. 10140. The Commission approved Agreement No. 10140 on May 1, 1975, thus allowing conference members to set rates in the U.S. Gulf/United Kingdom trade, upon the condition that, upon 48-hours notice, the parties could independently deviate from the previously agreed upon rate. Under the agreement, rate making authority was extended to member carriers serving the trade whether by all-water service from U.S. Gulf ports or by intermodal service from U.S. South Atlantic ports.

At issue is the January 11, 1978, request by the parties that the Commission grant an extension of the existing agreement. If granted, this extension would have been Amendment No. 8 of the original agreement. Approval of Amendment No. 8 by the Commission was opposed by the Department of Justice ("Department"). No other protest to approval was filed.

On August 30, 1978, the Commission issued its Order of Approval extending Agreement No. 10140 until February 29, 1980.

On March 19, 1979, the Department filed a Petition for Review of the approval of Agreement No. 10140-8 in the United States Court of Appeals for the District of Columbia Circuit pursuant to the Hobbs Act, 28 U.S.C. § 2341, et. seq. In the Court of Appeals the Department argued that the Commission lacked the statutory authority to approve an agreement fixing rates which included a division for inland carriers. The Respondent Conferences were permitted to intervene by Orders filed April 24, 1979 and June 26, 1979.

Respondent Conferences intervened in the Court of Appeals for the specific purpose of challenging the Department's petition for review on the ground that the Department lacked authority under the Hobbs Act to petition the

Court to review an Order of the Commission as a party aggrieved by such Order.

In an opinion dated December 19, 1980, the Court of Appeals held that the Commission did have statutory authority to approve Agreement No. 10140-8 but remanded for further consideration by the Commission because it "failed to secure sufficient information on which to base an informed judgment. . . ." (App. A, p. 3a to the Petition) With regard to Petitioner's and Respondent Conferences' two-pronged challenge, however, the Court of Appeals held that the Department, "[M]ay challenge the order approving this agreement by invoking the Hobbs Act's judicial review provisions in favor of a 'party aggrieved.'" The Court also held that, "[T]his case is constitutionally justiciable inasmuch as there is concrete adversement between the parties and the controversy is of the sort traditionally resolved by courts." (App. A, pp. 62a and 63a to the Petition.)

Petitions for Rehearing and Suggestions for Rehearing En Banc were filed by both the Department and by Petitioner. As is pertinent to this case, the Court of Appeals denied the Petition for Rehearing and Suggestion for Rehearing En Banc of Petitioner on March 13, 1981. (App. C to the Petition) The Department's suggestion for Rehearing En Banc was granted, however, and further consideration is currently pending.

Reasons for Granting the Writ

As will be dealt with in detail *supra,* the reasons advanced by Respondent Conferences for granting the writ are two-fold. First, the Court of Appeals erroneously applied this Court's holding in *United States* v. *Interstate Commerce Commission,* 337 U.S. 426 (1949) because a penetrating inspection beyond the surface identities of the

parties, as mandated by the *ICC* case, reveals no adverse case or controversy, which is a requisite of a justiciable action. Second, the legislative history and prior decisions of this Court and lower federal courts with respect to the Hobbs Act and the Shipping Act, 1916, as amended, are contrary to the Court of Appeals' holding that the Department may commence an action to set aside an order of the Commission.

POINT I

The Petition of the Department of Justice in the Court of Appeals for the District of Columbia Did Not Present a Justiciable Case or Controversy.

The issue before the Court in this petition for a writ of certiorari is one of first impression: does the Department's petition challenging the Commission's approval of a rate agreement present a sufficiently adversary case or controversy within the meaning of Article III, Section 2 of the Constitution?

This is a case of first impression in that it appears to be the first case where the authority of the Department, acting alone, to seek review of an agency order has been challenged.[1]

In the Court below the Department relied heavily upon *United States* v. *Interstate Commerce Commission*, 337 U.S. 426 (1949) for the proposition that the United States, represented by the Attorney General, could maintain a petition for review of an administrative agency's order. However, in the *ICC* case, this Court limited its recognition of the responsibility of the Department to seek judicial

[1] In *United States* v. *CAB*, 511 F.2d 743 (D.C.Cir. 1976), the Department alone sought judicial review of an agency order, but the issue of its authority to do so was not raised.

redress for the Government *as a shipper,* with the same powers of self-protection accorded all other shippers from whom sums of money were illegally extracted by the railroads (337 U.S. at 430-431). The case was clearly seen as an exception to the well-established rule of law that no entity may sue itself. The Court took care to nevertheless endorse this general principle, stating:

> "Properly understood the general principle is sound, for courts only adjudicate justiciable controversies. They do not engage in the academic pastime of rendering judgments in favor of persons against themselves." (337 U.S. at 430)

Thus this Court recognized that the *ICC* case was the exception, and not the rule, and acknowledged the traditional rule that a party could not normally sue itself. See, *Muskrat* v. *United States,* 219 U.S. 346, 357 (1911); *Flast* v. *Cohen,* 392 U.S. 83, 94 (1968).

This case involves a challenge to a Commission order by the Department not to protect any proprietary interest of the United States as in the *ICC* case, but to impose the interest of the United States as sovereign over the administrative action of one of its agencies. The case before this Court is thus similar to that involved in *United States* v. *Easement and Right of Way Over Certain Land in Bedford County, Tennessee,* 204 F Supp. 837 (E.D. Tenn. 1962).

In that case the Tennessee Valley Authority sought to condemn certain land in which the Farmers Home Administration held mortgage or security interests. The Court found that the United States was the only party involved in the case, which was essentially an interagency dispute, observing that:

> "The settlement of interagency problems within the United States Government is not a judicial function

but rather an administrative function. In short, the fact that . . . interagency conflicts of interest may exist, does not raise justiciable matters." (204 F.Supp. at 839)

This case presents precisely the type of interagency squabble rejected by the Court in the *Easement* case. The Department relies on its responsibility as an advocate of antitrust policies to maintain this action, yet as will be discussed *infra*, the Commission alone has been charged by the Congress with the responsibility of ensuring competition in the shipping industry, including review of rate agreements. In approving Agreement 10140, the Commission obviously found that the agreement met the standards for approvability pursuant to the Shipping Act, 1916. In contrast the Department, in filing its petition, took the opposite view. In essence, this case presents nothing more than the differing views of two agencies of the United States as to whether Agreement 10140 violated the antitrust laws of the United States. Under the rationale of the *Easement* case, such a dispute is not properly before the courts.

The Court below found that the decision of this Court in *United States* v. *Nixon*, 418 U.S. 683 (1974) provided a basis for holding that a justiciable controversy exists in the instant case. It is submitted that the *Nixon* holding is not dispositive of the instant case.

In *Nixon*, this Court approved the approach developed in the *ICC* case of going beyond a surface inquiry to determine whether a justiciable case or controversy is presented. (418 U.S. at 693). Utilizing this approach, the Court found that the Attorney General, statutorily empowered to conduct the criminal litigation of the Government, had given the Special Prosecutor "unique authority" by regulation, including the explicit power to contest the President's refusal

to furnish relevant evidence on the ground of executive privilege. This Court held:

> "Here at issue is the production or nonproduction of specified evidence deemed by the Special Prosecutor to be relevant and admissible in a pending criminal case. It is sought by one official of the Executive Branch within the scope of his express authority; it is resisted by the Chief Executive on the ground of his duty to preserve the confidentiality of the communications of the President. Whatever the correct answer on the merits, these issues are 'of a type which are traditionally justiciable.' *United States* v. *ICC*, 337 U.S. at 430, 69 S.Ct., at 1413. The independent Special Prosecutor with his asserted need for the subpoenaed material in the underlying criminal prosecution is opposed by the President with his steadfast assertion of privilege against disclosure of the material. This setting assures there is 'that concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends for illumination of difficult constitutional question'. *Baker* v. *Carr*, 369 U.S., at 204, 82 S.Ct., at 703. Moreover, since the matter is one arising in the regular course of a federal criminal prosecution, it is within the traditional scope of Art. III power. Id., at 198, 82 S.Ct. 691. (12, 13) *In light of the uniqueness of setting in which the conflict arises,* the fact that both parties are officers of the Executive Branch cannot be viewed as a barrier to justiciability. It would be inconsistent with *the applicable law and regulation, and the unique facts of this case* to conclude other than that the Special Prosecutor has standing to bring this action and that a justiciable controversy is presented for decision." (418 U.S. at 697) (Emphasis added)

The holding in *Nixon* was clearly and expressly limited to the unique fact pattern therein before the Court, and should not find broad application in all cases. Unlike its role in criminal matters, the Department is not solely authorized to enforce the antitrust laws—on the contrary, with regard to the shipping industry, the Commission has been given this responsibility by the Congress. While the Special Prosecutor had no recourse but to invoke the forum of the courts to present his views and resolve his controversy with the President, the Department had full opportunity to present its views during the proceedings leading up to the Commission's approval of the agreement in suit. The dispute between the President and the Special Prosecutor over the latter's subpoena power vis-à-vis executive privilege was in this Court's own words a "unique setting", and not the equivalent of the differing views of two government agencies over whether an agreement between private shipping concerns should receive approval from the Commission.

For all of the foregoing reasons, this case must be seen for what it is, an interagency dispute of the United States against itself, and as such, should not be entertained by the courts.

POINT II

The Court of Appeals for the District of Columbia Circuit Has Taken a Position With Respect to a Department Action to Set Aside a Commission Order Which Is at Odds With Not Only the Intent of Congress Respecting the Hobbs Act and the Shipping Act, 1916, as Amended, But Also With Prior Holdings of the Supreme Court and Other Federal Courts.

As previously stated, Respondent Conferences believe that the petition for a writ of certiorari presents this Court with a question of first impression. Respondent Conferences agree with petitioner that what is challenged is *first*, the statutory authority and *second*, the constitutional capacity of the Department to bring a Hobbs Act petition for review to set aside a Commission order. In the instant matter below the Department's challenge to Commission approval of Agreement No. 10140-8 was threefold: *one*, whether the Commission has the statutory authority to approve agreements between ocean carriers which fix rates for through land and water carriage; *two*, whether the Commission held an adequate hearing; and, *three*, whether the Commission must, in these circumstances, consider the impact of Agreement No. 10140-8 on rates.

A. *The Scope of the Hobbs Act*

The provisions of the Hobbs Act ("Act") for review of administrative orders set forth procedures for appealing from the orders of certain Government agencies—including the Federal Maritime Commission and the Interstate Commerce Commission. Respondent maintains that Congress never intended to make these provisions available to the Department. The legislative history of the Act, especially

when read in light of the legislative history of subsequent amendments to the Shipping Act, 1916, make abundantly clear the role intended for both the Department and the Commission.

Respondent believes that the Petition accurately sets forth the scope and legislative history of the Hobbs Act and its predecessors. Accordingly, Respondent will not restate that argument here but rather adopts that argument. Instead, Respondent directs the Court's attention to the legislative history of the Shipping Act, 1916, as amended.

B. *The 1961 Amendments to the Shipping Act, 1916*

Subsequent to this Court's decision in *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481 (1958) which raised serious questions as to the lawfulness of exclusive patronage (dual rate) contracts by steamship conferences, the Congress enacted a series of moratorium measures expressly authorizing the continuation of existing exclusive patronage contracts while it undertook to study not only that problem but also the activities of the conference system generally. The culmination of three years of intensive study by the Congress was the enactment of the 1961 amendments to the Shipping Act, 1916, which specifically authorized, among other things, exclusive patronage contracts[2] and added the so-called "public interest" standard to Section 15 of the Shipping Act, 1916.[3]

The three-year study conducted by the House Committee on Merchant Marine and Fisheries culminated with the

[2] Public Law 87-346, 75 Stat. 762 (1961).

[3] Public Law 87-346, 75 Stat. 763 (1961).

introduction of H.R. 4299, aimed primarily at permanently authorizing, among other things, exclusive patronage contracts. H.R. 4299 was later amended and reintroduced as H.R. 6775 and ultimately enacted as Public Law 87-346. The Department, not unpredictably, opposed enactment of this legislation. The Committee report stated:

> "The Department of Justice testimony on the legislation was generally unfavorable. While its position is consistent with the antitrust policy of the United States, it fails to take into account the peculiar nature of the particular business involved. The ocean steamship industry is unique among transportation services in a number of respects.
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> • • •
>
> The hearings of the committee have made it quite clear that our traditional antitrust concepts cannot be fully applied to this aspect of international commerce. . . [A]ny attempt to effect regulation of this commerce in a measure comparable to that applied to our domestic commerce would be highly detrimental to our essential American-flag merchant marine." [4]

While the House Committee rejected the essentials of the Department's arguments, H.R. 6775, as enacted by the House contained the following language:

> "Subsection 14b of the bill, a new subsection authorizing limited use of dual rate contracts, provided that no dual rate contract could be used unless and until the Board found that 'it is not intended, and will not be reasonably likely to cause the exclusion of any other

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[4] *Providing for the Operations of Steamship Conferences,* H.R. Rep. No. 498, 87th Cong., 1st Sess., pp. 12-13 (1961).

carrier from the trade, and . . . will be neither detrimental to the commerce of the United States nor *contrary* to the public interest, . . .'" [5] (Emphasis added)

When the Senate considered H.R. 6775, the entire House version was stricken by the Senate Commerce Committee and substitute language of its own was added. While the Senate Commerce Committee quoted the House Report respecting the adverse position espoused by the Department,[6] that Committee determined that the House had not gone far enough in rejecting the application of domestic antitrust concepts to international shipping.

It is equally clear that the entire Senate recognized clearly the effect the Senate Commerce Committee's revisions of the House enacted version would have. During the course of the floor debate antitrust proponents introduced amendments which would have reinstated the language of the House-enacted version.[7] After extended debate, and immediately prior to the defeat of the proposed amendments, Senator Russell Long of Louisiana exhorted his colleagues as follows:

"Senators must realize that the pattern that is necessary to engage in ocean commerce does not fit into the pattern of our Antitrust Division, composed of lawyers who would like to regulate a farm cooperative as though it were the Standard Oil of New Jersey . . ." [8]

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[5] H.R. 6775, Sec. 1; See also *Index to the Legislative History of the Steamship Conference/Dual Rate Law*, Senate Document No. 100, 87th Congress 2d Sess., p. 160 (1962). ("Index to Legislative History").

[6] *Supra*, note 4.

[7] Index to Legislative History, *supra*, note 5, pp. 390-423.

[8] *Id.* at 420.

The "public interest" standard was first proposed in the House in terms of a requirement that the Board (now the Commission) "affirmatively finds" the agreement to be in the public interest. After objection by the Board and the Department of Commerce,[9] it was modified in the House enacted version to read "nor contrary to the public interest," and was then adopted by the Senate Committee and discussed in its report as follows:

> "In addition to eight specific safeguards which must be in each dual-rate contract, the bill as it passed the House would require the Commission to find that the contract was (1) not intended to or reasonably likely to cause the exclusion of any other carrier from the trade, (2) not detrimental to the commerce of the United States, and (3) not contrary to the public interest.
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> • • • •
>
> Your committee believes that if the eight specific requirements set forth in its amendments are met by the proposed contract, it should be entitled to Commission approval unless the Commission finds that the contract would be detrimental to the commerce of the United States, or contrary to the public interest, or unjustly

[9] The Federal Maritime Board and Department of Commerce had commented on this aspect of the House version as follows:

> "[W]e recommend that the words 'that it affirmatively finds to be in the public interest' be stricken. In conformity with other similar statutes, such as the Aviation Act of 1958, we believe that, if a public interest standard is to be applied by the Board, it should be phrased in terms of permitting the approval of agreements which the Board does not find to be adverse to the public interest. See 49 U.S.C. 1382(b). Requiring a positive finding in favor of the public interest would prevent carriers from operating under arrangements which, although not meriting disapproval under the standards of the statute, could not be shown to positively contribute to the public interest." (H.R. Rep. No. 498, *supra*, note 4 at 18)

> discriminatory or unfair. We believe that any contract which contains the eight safeguards expressly required by the amended bill makes out a prima facie case that the contract is not detrimental to our commerce, or contrary to our public interest, or unjustly discriminatory or unfair." [10]

Additionally, section 15 of the Shipping Act, 1916, was amended, in pertinent part, to read (and the phrase was ultimately given the same treatment in the new Section 14b):

> "The Commission shall, after notice and hearing, disapprove, cancel or modify any agreement . . . that it finds to be discriminatory or unfair . . . , or to operate to the detriment of the commerce of the United States, (or to be contrary to the public interest), or to be in violation of this Act, and shall approve all other agreements. . . ."

Subsequent to the Senate enactment of H.R. 6775 the two Houses met in conference and adopted the Senate version without substantial revision. It is abundantly clear from the foregoing legislative history that the Congress reaffirmed its position of placing the regulation of the conference system with an independent regulatory agency, and outside the reach of the antitrust laws.

The Commission itself, however, voluntarily elected to incorporate antitrust standards as one part of the public interest test for approving agreements filed for approval pursuant to section 15 of the Shipping Act, 1916. This

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[10] *Steamship Conferences and Dual Rate Contracts*, S. Rep. No. 860, 87th Cong., 1st Sess. p. 23 (1961). See also the letter from then Deputy Attorney General Byron White critically commenting on and opposing this major change *Id.* at 32-34.

Court in *Federal Maritime Commission* v. *Aktieobolaget Sevenska Amerika Linien,* 390 U.S. 238, 246 (1968), ("Svenska") upheld the test conceived by the Commission as "an appropriate refinement of the statutory 'public interest' standard." Accordingly, this Court confirmed the earlier view of the Congress, in 1961, that the Commission was capable of defining and applying the "public interest" quite apart from the Department.

In *Federal Maritime Commission* v. *Pacific Maritime Association,* 435 U.S. 40 (1978) this Court, in reversing the Court of Appeals, held that collective bargaining agreements are not categorically exempt from the filing and approval requirements of section 15 of the Shipping Act, 1916. In his majority opinion, Mr. Justice White stated:

> "If subject to § 15, a filed agreement must be approved by the Commission unless it is discriminatory or unfair, operates to the detriment of the commerce of the United States, or is contrary to the public interest. Because § 15 provides that an approved agreement will not be subject to the antitrust laws, it is apparent that Congress assigned to the Commission, not to the courts, the task of initially determining which anti-competitive restraints are to be approved and which are to be disapproved under the general statutory guidelines. It is equally apparent that as a substantive matter, Congress anticipated that various anti-competitive restraints, forbidden by the antitrust laws in other contexts, would be acceptable in the shipping industry.
>
> That the Commission is the public arbiter of competition in the shipping industry is reflected in prior holdings that in reaching its decision under § 15 the Commission must 'consider the antitrust implications of an agreement before approving it,' FMC v. Seatrain

Lines, Inc., 411 U.S. 726, 739, 93 S.Ct. 1773, 1782, 36 L.Ed.2d 620 (1973), and should approve an anticompetitive agreement only if it is 'required by a serious transportation need, necessary to secure important public benefits or in furtherance of a valid regulatory purpose of the Shipping Act.' FMC v. Aktieobolaget Svenska Amerika Linien, 390 U.S. 238, 243, 88 S.Ct. 1005, 1009, 19 L.Ed.2d 1071 (1968). The Commission, nevertheless, may approve agreements 'even though they are violative of the antitrust laws. . . .' Seatrain, *supra*, 411 U.S., at 728, 93 S.Ct. at 1776.

The removal of the task of initially over-seeing private restraints on competition from the regime of the antitrust laws and the courts is not a historical anachronism that we are entitled to ignore. Congress responded to Federal Maritime Board v. Isbrandtsen Co., 356 U.S. 481, 78 S.Ct. 851, 2 L.Ed.2d 926 (1958), which held that a particular system of dual rates adopted by a shipping conference violated § 14 of the Shipping Act, by suspending the effect of that decision pending full study and permanent legislation. After extensive investigation, important amendments were forthcoming in 1961, Pub.L. 87-346, 75 Stat. 763, but the Act's basic approach —that the regulation of competition in the shipping industry is to be an administrative function, subject to judicial review—was reaffirmed. Indeed § 15 was amended 'by enlarging and clarifying the (Commission's) powers over agreements filed thereunder' by, among other things the addition of the public interest standard to § 15. H.R.Rep. No. 498, 87th Cong. 1st Sess., 17-18 (1961). Section 15 was declared by the Antitrust Subcommittee of the House Judiciary Committee, which undertook a three-year study of 'the entire gamut of antitrust problems in the ocean freight

> industry . . .', to be 'the heart of the Shipping Act.' H.R. Rep. No. 1419, 87th Cong., 2d Sess, 2, 15, (1962).
>
> It is appropriate, therefore, that the Court has recognized the broad reach of § 15 and resisted improvident attempts to narrow it." (Id. at 53-54).

Clearly, to allow the Department to engage in this type of second-guessing of Commission orders, where both the Congress and this Court have clearly established the primacy and expertise of the Commission in these matters, is at best counterproductive. The intervention of the Department to challenge Commission orders where no proprietary interest of the United States is at issue amounts to nothing more than a bureaucratic battle over turf.

In the Brief of Intervenors Pacific Westbound Conference, et al in *United States* v. *Federal Maritime Commission*, (D.C. Cir. No. 79-1299), intervenors at pp. 46-47 stated:

> "Although the Attorney General is empowered to conduct and supervise all litigation to which the United States or a federal agency is a party, 28 U.S.C. §§ 516, 519, this power does not give the Department the right to take an appeal from another agency's administrative ruling, S & E Contractors Inc. v. United States, 406 U.S. 1 (1972). In the S & E Contractors case, the Atomic Energy Commission initially approved S & E's claim for compensation under a government contract. However, when the General Accounting Office ruled that S & E's claim could not be certified for payment, the A.E.C. withheld payment. S & E then brought suit and the Department defended. In ruling in S & E's favor, the Supreme Court pointed out that the Department's role must be supportive of the agency. The Court stated: 'Normally,' where the responsibility for

rendering a decision is vested in a coordinate branch of Government, the duty of the Department of Justice is to implement that decision and not repudiate it.' Id. at 13. Thus, there is no statutory basis for the Department to appeal the FMC's ruling in the case at bar.

This suit by the Department frustrates the rights of the citizen petitioners before the FMC who might reasonably expect 'fair dealing from . . . the government as a unit rather than as an amalgam of separate entities.' S & E Contractors, Inc., supra, 406 U.S. at 10. Having followed the statutorily prescribed course in filing a section 15 agreement before the FMC, the proponents of such an agreement should not be forced to face a phalanx of other federal agencies in order to obtain final government approval once the FMC has acted. The United States government should be required to speak with one voice. The Department may not independently choose to erect additional bureaucratic roadblocks in the path of a citizen seeking relief from the FMC. To permit it to do so raises substantial questions of due process of law. See Cartier v. Secretary of State, 356 F.Supp. 460, 462 (D.D.C. 1973), dismissed on other grounds, 165 U.S. App. D.C. 130, 506 F.2d 191 (1974), cert. denied, 421 U.S. 947 (1975)."

Common sense, apart from the law, dictates the conclusion that to permit the Department to challenge Commission orders in the courts, where no proprietary interest of the United States is involved, has frustrated the Congressional intent behind the enactment and subsequent amendment of the Shipping Act, 1916. Indeed, this Congressional frustration was expressed recently in the Report Together With Additional Views to accompany the introduction of H.R. 6899. That Report stated as follows:

"The Department of Justice has contributed to a lack of evenhanded regulation of Section 15 agreements. The Department has generally not opposed agreements under Section 15 where all the parties to the agreement were foreign-flag carriers, regardless of the anticompetitive impact of the agreement. But the Department has opposed agreements with less anticompetitive impact where one or more of the parties were U.S.-flag carriers.

The Department has also adopted a double standard in seeking penalties for conduct already penalized by the Federal Maritime Commission. Although the Commission has fined many more foreign flag lines than U.S.-flag for rebating, the Department sought additional penalties under conspiracy statutes only against two U.S.-flag lines but not against any of the foreign-flag lines. The Committee considers that this dual approach to maritime antitrust regulation by the Department of Justice has been a contributing factor to the demoralization and decline of the U.S.-flag merchant marine." [11]

The House Committee on Merchant Marine and Fisheries Subcommittee on the Merchant Marine commenced extensive oversight hearings in 1975 to consider our national maritime policy. These hearings culminated in the introduction of H.R. 6899. While that legislation was not enacted, the continued Congressional frustration concerning the intervention of the Department not only before the Commission but also before the courts was and is keenly

[11] Omnibus Maritime Regulatory Reform, Revitalization, and Reorganization Act of 1980, Report Together with Additional Views, H.R. Rep. 96-935 (Part 1, 96th Cong., 2d Sess., p.22 (1980).

felt. This frustration was similarly felt by then President Carter. The Report stated:

> "The Administration has also recognized the compelling need for a comprehensive approach to regulation of ocean liner shipping. In 1978, President Carter appointed an Interagency Task Force to review maritime policies and produce a comprehensive and consistent federal position. On July 20, 1979, the President submitted a letter to the Chairman of the Committee on the results of that review. He found that 'federal regulation of the ocean shipping industry deserved prompt review by the Congress. Current laws appear to need substantial revision.' The President recommended that the Shipping Act be amended to: (1) *reestablish* the primacy of the FMC in regulating ocean shipping." [13] (Emphasis added)

Respondent contends that in view of the foregoing this Court should grant the Petition in order to bring before it this case of first impression and of national, indeed international significance.

CONCLUSION

Petition for Review submitted by the Department on behalf of the United States, in its non-proprietary capacity, which challenges the statutory authority of the Commission, does not present a justiciable case or controversy, as the United States cannot sue itself.

The Hobbs Act, and its predecessor acts, together with the Shipping Act, 1916, as amended, their legislative history and this Court's holdings clearly indicate that the Depart-

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[13] *Supra* note 11 at 23.

ment is not authorized to challenge an order of the Commission under these circumstances. For the reasons set forth above, Respondent Conferences urge that a writ of certiorari should issue to review the Opinion of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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July 2, 1981

Certificate of Service

I hereby certify that today, this 2nd day of July 1981, I have served three (3) copies of the foregoing Brief in Response to a Petition for Writ of Certiorari by United States mail, first class postage prepaid to each of the following:

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